U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-, LLC

DATE: MAY 3, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, which describes itself as a biodiesel and manufacturing business, seeks to permanently employ the Beneficiary in the United States as a plant engineer. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director, Texas Service Center, denied the petition on August 18, 2015. The Director determined that the Petitioner had not established its ability to pay the proffered wage as of the priority date.

The matter is now before us on appeal. The Petitioner asserts that it has established its ability to pay the proffered wage based upon the partial wages it paid to the Beneficiary, plus the available balances in its two bank accounts. Upon *de novo* review, we will dismiss the appeal.

I. LAW AND ANALYSIS

At issue in this case is whether or not the Petitioner has the ability to pay the proffered wage as of the priority date and continuing until the Beneficiary obtains lawful permanent residence.

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).[1] The priority date of the petition is August 11, 2014.[2]

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[1] *See* section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); *see also* 8 C.F.R. § 204.5(a)(2).

[2] The priority date is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

A petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. *See* 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted on August 11, 2014. The proffered wage as stated on the ETA Form 9089 is $93,766 per year.

The record indicates the Petitioner is structured as a limited liability company (LLC) and filed its tax returns on IRS Form 1065, U.S. Return of Partnership Income.[3] On the petition, the Petitioner claimed to have been established in and to currently employ 11 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the ETA Form 9089, the Beneficiary claimed to have worked for the Petitioner since February 2, 2009.

A petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a labor certification establishes a priority date for the immigrant petition, a petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. A petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

With the petition, the Petitioner submitted copies of its IRS Form 1065, U.S. Return of Partnership Income, for 2011, 2012, and 2013. In response to the Director's request for evidence (RFE), the Petitioner again submitted copies of its federal income tax returns from 2011, 2012, and 2013, but

[3] An LLC is an entity formed under state law by filing articles of organization. An LLC may be classified for federal income tax purposes as if it were a sole proprietorship, a partnership or a corporation. If the LLC has only one owner, it will automatically be treated as a sole proprietorship unless an election is made to be treated as a corporation. If the LLC has two or more owners, it will automatically be considered to be a partnership unless an election is made to be treated as a corporation. If the LLC does not elect its classification, a default classification of partnership (multi-member LLC) or disregarded entity (taxed as if it were a sole proprietorship) will apply. *See* 26 C.F.R. § 301.7701-3. The election referred to is made using IRS Form 8832, Entity Classification Election. In the instant case, the Petitioner, a multi-member LLC, is considered to be a partnership for federal tax purposes.

did not submit a copy of its tax return for 2014. The record does not include any regulatory prescribed evidence demonstrating the Petitioner's ability to pay the proffered from the August 11, 2014 priority date onward.

In response to the Director's RFE, the Petitioner also submitted copies of its checking account statements from August 2014 through July 2015, and copies of Certificate Renewal Notices relating to a Certificate of Deposit. On appeal, the Petitioner asserts that these account balances are sufficient to establish its ability to pay the difference between the wages paid to the Beneficiary and the proffered wage. However, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the Petitioner has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture. Furthermore, bank statements show the amount in an account on a given date, and do not weigh that asset against other liabilities; thus, they cannot show the sustainable ability to pay a proffered wage. Finally, the Petitioner submitted no evidence to demonstrate that the funds reported on its bank statements somehow reflect additional available funds that would not have been reflected on its tax returns.

Thus, from the date the ETA Form 9089 was accepted for processing by the DOL, the Petitioner did not establish that it had the continuing ability to pay the proffered wage through an examination of wages paid to the Beneficiary, or through its net income or net current assets.

USCIS may consider the overall magnitude of a petitioner's business activities in its determination of its ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of its net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the record does not include the Petitioner's 2014 or 2015 federal tax return, audited financial statements, or annual report as required by 8 C.F.R. § 204.5(g)(2). While we may consider other factors similar to *Sonegawa*, nothing exempts the Petitioner from submitting evidence required by regulation. The evidence submitted does not establish that the Petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

We additionally note that the record does not establish that the Petitioner and the employer that filed the labor certification are the same entity. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). The Federal Employer Identification Number (FEIN) provided on the labor certification and the tax returns in the record is

However, the FEIN provided on the Form I-140 and the Form W-2 issued to the Beneficiary is The Petitioner must address these discrepancies in any further filings.

II. CONCLUSION

In summary, the Petitioner did not establish its ability to pay the proffered wage as of the August 11, 2014, priority date through wages paid, its net income, or its net current assets.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966); *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of A-, LLC*, ID# 16856 (AAO May 3, 2016)

[4] Although the Beneficiary's 2014 Form W-2 lists the same FEIN as the Form I-140, it lists a different employer name and address.